(1) Supreme Court, U.S.
FILED

96 181 AUG 1 1996

No. 96- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

VANCE ALLRED,

Petitioner,

v.

A.L.L. AND D.M.L. (ADOPTIVE PARENTS), AND ADOPTION CENTRE OF KANSAS, INC.,

Respondents.

On Petition for Writ of Certiorari to the Eighteenth Judicial District, Sedgwick County Kansas

---

PETITION FOR WRIT OF CERTIORARI

KENNETH H. JACK
DAVIS & JACK, L.L.C.
P.O. Box 12686
2121 West Maple
Wichita, KS 67277-2686
(316) 945-8251

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

96 PP

QUESTIONS PRESENTED FOR REVIEW

Kansas adoption statutes obviate the need for the natural father's consent in cases where he fails to contribute to the support of the mother during the six months immediately preceding the birth of the child. In contrast, under Ohio law non-support of the mother prior to giving birth is not a statutory ground for adoption without the father's consent. In the instant case, the natural father (petitioner, Vance Allred) and the natural mother (R.S.) lived as residents of Ohio during approximately the first six and one-half months of her pregnancy. Without Vance Allred's knowledge or consent, R.S. moved to Kansas and resided there during the last two and one-half months of her pregnancy. Vance Allred's parental rights were terminated in a Kansas proceeding on the ground that he failed to contribute to the support of R.S. prior to the birth of the child.

The primary question presented for review is whether the use of Kansas's pre-birth non-support parental rights termination statute to terminate Vance Allred's parental rights violated his due process rights under the Fourteenth Amendment to the U.S. Constitution.

The Kansas Court also terminated Vance Allred's parental rights finding him an unfit parent, citing a failure to undertake support as the primary ground. A subsidiary question for review is whether violation of Vance Allred's due process rights also entitles him to a new trial on the issue of parental fitness.

LIST OF PARTIES TO THE PROCEEDING

The petitioner seeking U.S. Supreme Court review is Vance Allred, the natural father of Baby Boy S.

The child which was the subject of the proceedings below has been referred to as "Baby Boy S," instead of by his true name, for the child's protection.[1]

The child will be so referred to herein unless requested otherwise by the Court. Baby Boy "S" was not formally a party in the appeal below.

The prospective adoptive parents, Respondents herein, were referred to in proceedings below as "ALL" and "DML" in order to protect their identities. The Respondents will be so referred to herein, unless requested otherwise by the Court.

Adoption Centre of Kansas, Inc., was named as a Third Party Appellee in proceedings below.

The natural mother of Baby Boy "S" has been referred to below as "R.S." for the protection of her identity. R.S. was not a named party in the appeal below.

[1] Kansas Supreme Court Rule 7.042(b) provides that on appeal, parties to adoption proceedings are referred to by initials. This convention will be followed by Vance Allred unless requested otherwise by the Court.

TABLE OF CONTENTS

Table of Authorities	4
Rulings of Lower Courts	6
Statement of Grounds Upon Which Jurisdiction of Court is Invoked	7
Statement of Constitutional Provision and Statutes Involved in the Case	9
Statement of Stages in Proceedings Below During Which Fourteenth Amendment Due Process Issues Were Raised	11
Statement of the Case	12
Argument and Authority	16
Appendix	1a - 42a

TABLE OF AUTHORITIES

Cases:

Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) 16

Kovacs v. Cooper, 336 U.S. 77, 95, 69 S.Ct. 448, 93 L.Ed. 513 (1949) 16

Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) 16

Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 110, 86 L.Ed. 1655 (1942) 17

May v. Anderson, 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221 (1953) 17

Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944) 17

Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) 17

Davis v. Smith, 583 S.W.2d 37 (Ark. 1979) 18

Matter of D.T., 237 N.W.2d 166 (S.D. 1975) 18

Matter of V.D.D., 278 N.W.2d 194 (S.D. 1979) 18

Matter of A.M.K., 312 N.W.2d 840,
105 Wis.2d 91 (Wis. App. 1981) 18

Matter of Gentry, 369 N.W.2d 889,
(Mich. App. 1985) 18

People v. D.A.K., 596 P.2d 747,
(Colo. 1979) 18

In Interest of L.G., 764 S.W.2d 89,
(Mo. Banc. 1989) 18

Linn v. Linn, 286 N.W.2d 765,
205 Neb. 218 (1980) 18

In Interest of D.L.H., 253 N.W.2d 283,
198 Neb. 444 (1977) 18

*Alsager v. District Court of Polk
County, Iowa*, 406 F. Supp. 1018
(U.S.D.C. S. Iowa 1975) 18

Allstate Ins. Co. v. Hague, 449 U.S. 302,
66 L.Ed. 2d 521, 101 S.Ct. 633 (1981) 22

Statutes:

K.S.A. 59-2136(h)(4) 19

Ohio Statutes Annotated § 3107.07(B) 19

RULINGS OF LOWER COURTS

In this action, the original ruling was entered by the Honorable Hal Malone, Judge of the Eighteenth Judicial District Court, Sedgwick County, Kansas. Judge Malone's decision was reviewed by the Kansas Court of Appellees, and affirmed. Vance Allred petitioned the Kansas Supreme Court for review of the decision of the Kansas Court of Appeals; and review was denied on May 3, 1995. Each of these decisions is reproduced in the Appendix hereto.

STATEMENT OF GROUNDS UPON WHICH JURISDICTION OF COURT IS INVOKED

Petitioner, Vance Allred, seeks U.S. Supreme Court review of the decision of the Trial Court which terminated his parental rights. The Trial Court's decision was entered on March 7, 1995, and the Kansas Court of Appeals' decision affirming said ruling was entered on March 8, 1996. Petitioner subsequently sought Kansas Supreme Court review of the Kansas Court of Appeals decision; and review was denied on May 3, 1996.

28 U.S.C. § 1257(a) in pertinent part states:

> "(a) Final judgments or decrees rendered by the highest court of a state in which a decision may be had, may be reviewed by the Supreme Court by Writ of Certiorari where . . . any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . of, . . . the United States."

The Kansas Supreme Court denied review of the decision of the Kansas Court of Appeals on May 3, 1996. Therefore, the decision sought to be reviewed herein constitutes a final judgment or decree rendered by the highest court of the state, within the meaning of 28 U.S.C. § 1257(a). At trial, and before the Kansas Court of Appeals, the Petitioner's right to due process under the Fourteenth Amendment to the United States Constitution was consistently asserted. Therefore, Vance Allred specially set up his rights under the U.S. Constitution within the meaning of 28 U.S.C. § 1257(a).

All prerequisites to a Writ of Certiorari specified by 28 U.S.C. § 1257(a) are satisfied herein. Petitioner, Vance Allred, relies upon 28 U.S.C. § 1257(a) as conferring upon this Court jurisdiction to review the judgments and decisions below by Writ of Certiorari.

STATEMENT OF CONSTITUTIONAL PROVISION AND STATUTES INVOLVED IN THE CASE

The constitutional provision involved in this case is the Fourteenth Amendment to the United States Constitution which in pertinent part states:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

Ohio Revised Code Annotated, Title XXXI, Chapter 3107 *Adoption* § 3107.07(B) (1995) in pertinent part states:

> "Consent to adoption is not required of any of the following: . . .
>
> > (B) The putative father of a minor if the putative father . . . files an objection with the court, department, or agency and the court finds, after proper service of notice and hearing, that he is not the father of the minor, or that he has willfully abandoned or failed to care for and support the minor, or abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or its placement in the home of the petitioner, whichever occurs first; . . ."

Kansas Statutes Annotated, Article 21 - Adoptions, section 59-2136(h) (1994) in pertinent part states:

> "(h) . . . [T]he court may order that parental rights be terminated, upon a finding by clear and convincing evidence, of any of the following:
>
> (1) The father abandoned or neglected the child after having knowledge of the child's birth;
>
> (2) the father is unfit as a parent or incapable of giving consent;
>
> (3) the father has made no reasonable efforts to support or communicate with the child after having knowledge of the child's birth;
>
> (4) the father, after having knowledge of the pregnancy, failed without reasonable cause to provide support for the mother during the six months prior to the child's birth;
>
> (5) the father abandoned the mother after having knowledge of the pregnancy;
>
> (6) the birth of the child was the result of rape of the mother; or
>
> (7) the father has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition."

STATEMENT OF STAGES IN PROCEEDINGS BELOW DURING WHICH FOURTEENTH AMENDMENT DUE PROCESS ISSUES WERE RAISED

1. At pages 23-24 of Vance Allred's Trial Brief filed December 2, 1994, Vance Allred argued that as a matter of due process of laws under the Fourteenth Amendment to the United States Constitution, his parental rights should not be terminated.

2. Prior to the conclusion of the trial, the Trial Court requested that each of the parties submit Proposed Findings of Fact and Conclusions of Law. Vance Allred's Proposed Findings of fact and conclusions of law were filed February 15, 1995. Vance Allred's Conclusions of Law Nos. 10, 13, 29, and 30 all requested findings regarding Fourteenth Amendment due process in his favor.

3. The trial herein concluded on February 17, 1995, with oral arguments. During oral arguments, counsel for Vance Allred strenuously argued that termination of Vance Allred's parental rights would violate his due process rights under the Fourteenth Amendment to the United States Constitution. (See Transcript of oral proceedings occurring February 17, 1995, in *In the Matter of the Adoption of Baby Boy S.*, District Court of Sedgwick County, Kansas, Case No. 94-A-141, pg. 426, line 25 through pg. 427, line 6; pg. 430, lines 5-9; pg. 430, lines 19-24; pg. 431, line 22 through pg. 432, line 4; and pg. 432, lines 17-21.)

4. The petitioners' Proposed Findings of Fact and Conclusions of Law failed to comment on Fourteenth Amendment due process in any way. The Trial Court's decision was taken in its entirety from the petitioners'

Proposed Findings of Fact and Conclusions of Law. The Trial Court's decision similarly made no comment on Fourteenth Amendment due process.

5. Vance Allred's Brief in Chief on appeal to the Kansas Court of Appeals was filed September 26, 1995. Pgs. 13-19 of said brief dealt with the issue of Fourteenth Amendment due process as it relates to termination of Vance Allred's parental rights.

6. Vance Allred's Reply Brief on appeal was filed December 12, 1995. At pgs. 6-9 of said brief, Vance Allred argued the issue of Fourteenth Amendment due process as it relates to termination of his parental rights.

7. The Kansas Court of Appeals' decision was entered March 8, 1996. The decision did not suggest in any way that the due process issue had not been properly reserved. The Kansas Court of Appeals dealt with Fourteenth Amendment due process at pgs. 8-15 of its decision.

8. Vance Allred's Petition for Review by the Kansas Supreme Court was filed April 8, 1996. In said petition, the issue of Fourteenth Amendment due process as it relates to termination of Vance Allred's parental rights was addressed at pgs. 4-10. The Kansas Supreme Court denied review without comment on May 3, 1996.

STATEMENT OF THE CASE

Vance Allred is 22 years of age. He resides in Martin, Ohio. At all relevant times, Vance Allred was an Ohio resident. The child at issue in these proceedings is Baby Boy"S," born April 26, 1994. Baby Boy"S" is Vance Allred's first and only child.

Vance Allred is an Operations Manager for Dold Companies, which is a lumber supply firm in Perrysburg, Ohio. Vance Allred has never been charged with a criminal violation more serious than a speeding ticket. The factual findings made by the Trial Court do not include a finding that Vance Allred ever caused harm to any person. Vance Allred does not drink alcohol and he has never tried cocaine.

The natural mother is R.S. During R.S.'s pregnancy, she was engaged to be married to Vance Allred, and she wore an engagement ring he had given to her. For a period of time during the pregnancy and during the engagement, R.S. lived in an apartment with Vance Allred near Toledo, Ohio.

During December of 1993, after R.S. had moved out of Vance Allred's apartment. They met and spoke with each other at a shopping mall in Toledo, Ohio. During the conversation, Vance Allred was informed that R.S. had a miscarriage. The information was false.

One of R.S.'s residences in Ohio after she moved out of Vance Allred's apartment was the home of a girlfriend. While she was living with the girlfriend, R.S. contacted an adoption agency in Houston, Texas, to arrange for an adoption. The Houston adoption agency sent a letter to Vance Allred on December 30, 1993. The letter enclosed a

document entitled *Affidavit of Waiver of Interest in a Child* and stated that if Vance Allred did not wish to sign the Affidavit, he would need to contact an attorney. When Vance Allred received the letter, he contacted his lawyer. His lawyer wrote a letter to the Houston adoption agency, stating that Vance Allred would not consent to an adoption, and that he wished to raise the child himself. Enclosed with the letter was a sworn *Acknowledgement of Parentage* signed by Vance Allred.

R.S. then contacted a Toledo adoption attorney who provided R.S. with a portfolio of prospective adoptive parents. The portfolio included adoptive parents from all over the United States. R.S. chose Respondents, A.L.L. and D.M.L. who live in Kansas.

R.S. began to cohabit in Ohio with a new "boyfriend" in mid-December, 1993. R.S. moved to Wichita, Kansas, with the boyfriend sometime in early February of 1994. Respondents, A.L.L. and D.M.L. paid R.S.'s moving expenses from Ohio to Kansas, and they paid her living expenses while she resided in Wichita, Kansas.

Baby Boy "S" was born approximately two and one-half months after the move from Ohio, on April 26, 1994. Baby Boy "S" was placed in A.L.L. and D.M.L.'s custody immediately after birth.

From the time R.S. left Ohio to the time she gave birth in Kansas, she never contacted Vance Allred to tell him where she was residing. The Trial Court did not find that Vance Allred had any notice of R.S.'s whereabouts in Kansas prior to the birth.

The Trial Court terminated Vance Allred's parental rights on two grounds: First, that Vance Allred had failed to support R.S. during the six (6) months preceding the birth;[2] and second, that Vance Allred is unfit, primarily due to non-support, to be a father.

The Trial Court specifically found that Vance Allred never abandoned R.S.

[2] No showing was made at trial that R.S. ever went without adequate food, shelter, clothing or medical care. R.S. was fed, clothed and housed by the adoptive parents while she was in Kansas.

ARGUMENT AND AUTHORITY

I. THE TERMINATION OF VANCE ALLRED'S PARENTAL RIGHTS VIOLATED HIS CONSTITUTIONAL RIGHT OF DUE PROCESS.

Vance Allred's constitutional due process argument is based upon two propositions. First, under the Fourteenth Amendment to the U.S. Constitution Vance Allred was entitled to fair prior warning of the required or proscribed actions which resulted in the loss of his parental rights. Second, Vance Allred did not receive such a warning. If both propositions are true, Vance Allred's due process rights were violated.

A. Due Process Requires Fair Warning.

The due process fair warning requirement flows from the nature of a man's rights as a father. In *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); the U.S. Supreme Court held:

> "It is plain that the interest of a parent in the companionship, care, custody and management of his or her children 'comes to this court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' *Kovacs v. Cooper*, 336 U.S. 77, 95, 69 S.Ct. 448, 458, 93 L.Ed. 513 (1949) (Frankfurter, J., concurring). The Court has frequently emphasized the importance of the family. The rights to conceive and raise one's children have been deemed 'essential.' *Meyer v. Nebraska*, 262

> U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923), 'basic civil rights of man,' *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 110, 113, 86 L.Ed. 1655 (1942), and 'rights far more precious . . . than property rights,' *May v. Anderson*, 345 U.S. 528, 533, 73 S.Ct. 840, 843, 97 L.Ed. 1221 (1953). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply or hinder.' *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944). The integrity of the family unit has found protection in the due process clause of the Fourteenth Amendment, *Meyer v. Nebraska*, supra, 262 U.S. at 399, 43 S.Ct. at 626, the equal protection clause of the Fourteenth Amendment, *Skinner v. Oklahoma*, supra, 316 U.S. at 541, 62 S.Ct. at 1113, and the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 496, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (Goldberg, J., concurring). Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. . . ." (Emphasis Added)

Since a father's parental rights are precious, fair warning of the actions, required or proscribed, which might result in loss of the right is essential. The law must allow a man to be secure in his precious or fundamental rights. To avoid forfeiture of a fundamental liberty interest, a father should be required to do no more than conform his actions to the requirements of which he has had fair warning. If the state seeks to terminate a fundamental right grounded upon a

failure to take some required action (such as tendering support money), the lack of fair warning of the requirement should be a defense.

The "fair warning" requirement is well recognized in case law dealing with unconstitutional vagueness of parental rights termination statutes. The following cases stand for the proposition that under the Fourteenth Amendment a parental rights termination statute must give fair warning of the required or proscribed actions which might result in the loss of parental rights:

> *Davis v. Smith*, 583 S.W.2d 37, 42 (Ark. 1979); *Matter of D.T.*, 237 N.W.2d 166, 169 (S.D. 1975); *Matter of V.D.D.*, 278 N.W.2d 194, 196 (S.D. 1979); *Matter of A.M.K.*, 312 N.W.2d 840, 845, 105 Wis.2d 91 (Wis. App. 1981); *Matter of Gentry*, 369 N.W.2d 889, 893 (Mich. App. 1985); *People v. D.A.K.*, 596 P.2d 747, 751 (Colo. 1979); *In Interest of L.G.*, 764 S.W.2d 89, 94 (Mo. Banc. 1989); *Linn v. Linn*, 286 N.W.2d 765, 768, 205 Neb. 218 (1980); *In Interest of D.L.H.*, 253 N.W.2d 283, 286, 198 Neb. 444 (1977); and *Alsager v. District Court of Polk County, Iowa*, 406 F. Supp. 1018 (U.S.D.C. S. Iowa 1975).

The principle of fair warning should apply without regard to the particular means by which fair warning is frustrated. There are 50 parental rights termination statutes in the United States. An obvious way to frustrate fair warning is to allow an expectant mother, through the expedient of travel, to select among the 50 state parental rights termination statutes. A putative father who knows the statute he must comply with (even if it is vague), is in a better

position than a father who has to wonder which of the 50 parental rights termination statutes will ultimately be used against him.

Vance Allred requests that this Court accept the proposition that he was entitled to fair prior warning that his parental rights would be subject to Kansas law.

B. Vance Allred Did Not Receive Fair Warning.

The Trial Court terminated Vance Allred's parental rights based on K.S.A. 59-2136(h)(4), which states:

> ". . .[T]he court may order that parental rights be terminated, upon a finding by clear and convincing evidence, of any of the following: . . .
>
> (4) The father, after having knowledge of the pregnancy, failed without reasonable cause to provide support for the mother during the six months prior to the child's birth; . . ."

The six months prior to the birth in the instant case began on October 26, 1993, and ended on April 26, 1994, when Baby Boy "S" was born. Without giving notice to Vance Allred, R.S. moved from Ohio to Kansas in early February, 1994. For more than one-half of the six month time period, Vance Allred and Rebekah Shumer resided in Ohio. During that time, they were subject to *Ohio Statutes Annotated* § 3107.07(B), which states:

> "Consent to adoption is not required of any of the following: . . .
>
> (B) The putative father of a minor if the putative father . . . has willfully abandoned or

> failed to care for and support the minor, or has abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or its placement in the home of the petitioner, whichever occurs first; . . ."

This Ohio statute lists abandonment as the sole ground for termination of parental rights which is capable arising prior to birth of the child. Abandonment was asserted against Vance Allred in the instant case; and he won a ruling in his favor on the issue. The Trial Court ruled:

> ". . .I also find that the petitioners have failed to sustain their burden of proof as to: 'that the father abandoned the mother after having knowledge of the pregnancy.' I think this was -- **there was really no abandonment by either side**. The mother went her way and, in her separate way, and he went his. . . ." (Emphasis Added) (*Trial Transcript*, pg. 455, lines 10.)

This ruling eliminated the sole Ohio ground for termination of parental rights. From October 26, 1993, through early February, 1994, Vance Allred could not conceivably be considered to be on notice that Kansas law would apply to him. Instead, Vance Allred was on notice that Ohio law applied and that a failure to tender support is not grounds for termination of his parental rights.

Roughly three and one-half months of the six month pre-birth period were spent by Vance Allred and R.S. as Ohio residents; and the remaining two and one-half months were spent with R.S. as a Kansas resident. With this

division of time in mind, the question must be asked: What is "fair warning" of Kansas's six month pre-birth non-support statute (i.e., K.S.A. 59-2136(h)(4))? All would agree that fair warning exists if at all relevant times, the father and expectant mother were Kansas residents. All would also agree that fair warning would not exist if the expectant mother moved from Ohio to Kansas the day before the birth. It is difficult to place along this spectrum of circumstances the dividing line between fair warning and insufficient notice. However, it is not difficult to determine on which side of the line the facts of the instant case fall.

Under the instant facts, no finding was made at trial that Vance Allred had knowledge prior to the birth of R.S.'s presence in Kansas. For more than one-half of the six month time period in question, not only did Vance Allred have no notice that his parental rights might be terminated for non-support of the mother, he was on actual notice of the opposite fact. Under Ohio law, pre-birth non-support is not a ground for termination of rights. Ohio law spoke loudly that non-support is not grounds for termination. If there was any indication to Vance Allred that his rights might be subjected to Kansas law, it came to him only as a faint whisper. At all times, Vance Allred remained on notice that Ohio law applied. It is clear under the facts of the instant case that Vance Allred did not receive fair warning that his parental rights would be attacked utilizing Kansas law.

For purposes of consideration of this Petition, Vance Allred requests that the U.S. Supreme Court accept that he did not receive fair warning that his parental rights would be subjected to Kansas law. Without giving him fair warning, that Kansas law would apply; Kansas law could not be used against him to strip him of his parental rights without violating the Fourteenth Amendment.

II.. CERTIORARI IS WARRANTED BECAUSE DUE PROCESS/CONFLICTS OF LAW CASE LAW DOES NOT ADDRESS SITUATIONS WHERE FUNDAMENTAL LIBERTY INTERESTS ARE AT STAKE.

In *Allstate Inc. Co. v. Hague*, 449 U.S. 302, 312, 66 L.Ed.2d 521, 101 S.Ct. 633 (1981), the U.S. Supreme Court set a standard for determining whether a state's choice of law decisions satisfy Fourteenth Amendment due process, holding:

> "[F]or a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant contact or significant aggregation of contacts creating state interests such that choice of its law is neither arbitrary nor fundamentally unfair."

The Kansas Court of Appeals applied this standard citing the following factors:

> ". . . R.S. had openly been a Kansas resident for at least 60 days prior to the birth of Baby Boy S. The child was born in Kansas and was relinquished to a Kansas adoption agency. The child has resided in Kansas with a Kansas adoptive family throughout the proceeding. . . ." (See March 6, 1996, decision of the Kansas Court of Appeals, pg. 10.)

Based on these three factors, the Kansas Court of Appeals found that Kansas has significant contacts creating state interests in applying its law. Thus, the Kansas Court of Appeals found the *Allstate Ins. Co. v. Hague* standard to be

satisfied. The problem is that none of the factors considered by the Kansas Court of Appeals had anything to do with protecting Vance Allred's fundamental parental rights.

The right at stake in *Allstate Ins. Co. v. Hague*, supra, was a question of whether uninsured motor coverage in an automobile liability policy could be "stacked." The key difference between *Allstate Ins. Co. v. Hague*, supra, and the instant case is that the conflict of law in the instant case involves extinguishment of a fundamental liberty interest (i.e., parental rights). In *Kovacs v. Cooper*, 336 U.S. 77, 95, 69 S.Ct. 448, 458, 93 L.Ed. 513 (1949), the U.S. Supreme Court held:

> "[T]he interest of a parent in the companionship, care, custody and management of his or her children comes to this court with a momentum for respect lacking when appeal is made to the liberties which derive merely from shifting economic arrangements."

The automobile liability insurance issue in *Allstate Ins. Co. v. Hague* was such a "shifting economic arrangement." According to *Kovacs v. Cooper*, supra, fundamental liberty interests such as parental rights deserve additional respect. If the Kansas Court of Appeals had accorded Vance Allred's parental rights the additional respect required by *Kovacs v. Cooper*, supra, it would not have found a "significant aggregation of contacts" based solely upon R.S.'s, Baby Boy S's, and the adoptive parents' presence in Kansas.

In order to give due respect to fundamental liberty interests, the primary factors for consideration in applying the *Allstate v. Ins. Co. v. Hague* standard should have been

Vance Allred's contacts with Kansas (if any) and his level of notice (if any) that his rights would be tested under Kansas law.

Counsel for Vance Allred has found no reported case which applies the due process/conflicts of law analysis of *Allstate Ins. Co. v. Hague*, supra, to a fact situation where a fundamental liberty interest is at stake. When *Stanley v. Illinois*, supra; *Kovacs v. Cooper*, supra; and *Allstate Ins. Co. v. Hague*, supra, are read in conjunction with each other, one cannot logically assume that it is proper to apply a due process/conflicts of law analysis developed in an economic interest case, to a case involving fundamental liberty interests. When the U.S. Supreme Court developed the due process/conflicts of law analysis of *Allstate Ins. Co. v. Hague*, it likely was not considering the additional respect for fundamental liberty interests mandated by *Stanley v. Illinois*, supra, and *Kovacs v. Cooper*,. supra.

The impact of Fourteenth Amendment due process upon conflicts of law questions involving fundamental liberty interests remains unanswered by U.S. constitutional case law. An answer is needed because there is nothing more precious than a man's right to have an ongoing parent/child relationship with his child. Vance Allred's fundamental rights are at stake. His fundamental parental rights have been stripped, utilizing a due process standard developed in an economic interest case. Vance Allred believes that his Fourteenth Amendment due process rights have been violated; and he requests that certiorari be granted in order to accord him an opportunity to remedy what he asserts is a wrong committed against him.

WHEREFORE, Petitioner, Vance Allred, respectfully requests that his Petition for U.S. Supreme Court Review be granted, and that a Writ of Certiorari be issued.

Respectfully submitted,

KENNETH H. JACK
DAVIS & JACK, L.L.C.
P.O. Box 12686
2121 West Maple
Wichita, KS 67277-2686
(316) 945-8251

August 1, 1996

Attorneys for Petitioner

APPENDIX

INDEX TO APPENDIX

Ruling of the Trial Court; Nunc Pro Tunc Journal Entry of Judgment Terminating the Parental Rights of Vance Allred	1a
Opinion of the Kansas Court of Appeals	18a
Order of the Kansas Supreme Court denying review	42a

MARTIN, PRINGLE, OLIVER, WALLACE
& SWARTZ, L.L.P.
300 Page Court, 220 West Douglas
Wichita, Kansas 67202
(316) 265-9311

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
PROBATE DEPARTMENT

IN THE MATTER OF THE ADOPTION OF	) Case No. 94-A-141
BABY BOY SHUMER, A Minor Child.	)

PURSUANT TO K.S.A. § 59-2136(e) & (h)

NUNC PRO TUNC
JOURNAL ENTRY OF JUDGMENT TERMINATING THE PARENTAL RIGHTS OF VANCE ALLRED

The Court, having heard the evidence and having considered the Proposed Findings of Fact and Conclusions of Law submitted by the parties, together with the argument of counsel, makes the following findings of fact and conclusions of law in deciding that the Petition for Adoption filed by the prospective adoptive parents requesting the Court to terminate the parental rights of Vance Allred and the Petition to Terminate Parental Rights of the Natural Father filed by the Adoption Centre, Inc. of Kansas should be

granted to the extent said rights shall be terminated. This Journal Entry corrects the previous Journal Entry filed on March 2, 1995.

FINDINGS OF FACT

1. Baby Boy Shumer, a/k/a Micah Timothy Shumer, was born on April 26, 1994, in Wichita, Sedgwick County, Kansas.

2. Rebekah Jean Shumer is the child's natural mother. She was a resident of Ohio at the time of conception and until February of 1994. In late January or early February, 1994, she relocated to Wichita because the prospective adoptive parents reside in Sedgwick County, Kansas, and she needed their financial assistance.

3. The natural father of the child is Vance Allred, who is 22 years old and at all relevant periods was a resident of Ohio.

4. The natural parents met in the late spring of 1993. Ms. Shumer's parents are very committed to their religious faith and have other younger children. They, therefore, required Ms. Shumer to abide by their rules or move out of their house. As a result of her relationship with Mr. Allred, she moved into the home of Mr. Allred's parents.

5. The relationship between Ms. Shumer and Mr. Allred was marred by controversy which frequently resulted in his extreme anger, at which times he would knock holes in doors, hit walls, and throw food and other items around the house. Part of the couple's conflict arose from the fact that Ms. Shumer wanted to continue a relationship with her parents, while Mr. Allred felt that they were controlling her and that they disliked him. Conversely, he later imposed requirements which suggested that he was trying to control Ms. Shumer, to the exclusion of her parents. In July of 1993, Ms. Shumer accepted an invitation to visit, along with her parents, a family friend in Illinois. Before the visit, Mr. Allred forced Ms. Shumer to move out of her parents'

house. His parents paid some medical bills for Ms. Shumer's benefit, so she wrote to thank them for their kindness, and offered to repay them. She also expressed the hope that Mr. Allred would change his mind. While in Illinois, Ms. Shumer became lonely and called Mr. Allred, asking him to drive to Illinois to bring her back to Ohio. Mr. Allred used this incident to criticize Ms. Shumer's parents for abandoning her in Illinois, although Ms. Shumer had freely elected to undertake the initial trip. This and Ms. Shumer's prior moves placed Mr. Allred on notice of her wandering ways.

6. Sometime after the foregoing incident, Ms. Shumer discovered she was pregnant. Mr. Allred's parents arranged for Ms. Shumer to see Mrs. Allred's doctor who confirmed the pregnancy and established the due date as April 26, 1994. Mr. Allred did not accompany Ms. Shumer on any of her appointments with the doctor, but was told of the due date. Mr. Allred's parents paid one or two of the doctors' bills related to the pregnancy. Although Mr. Allred testified that he agreed to, and has made some payments to reimburse them, no documents were offered to prove the repayment. In addition, the payments by Mr. Allred's parents all predate October 26, 1993, the commencement of the six-month period prior to the child's birth. The payments, to the extent they could possibly relate to the pregnancy, total less than $100.

7. In late August, after Mr. Allred had knowledge of the pregnancy, he and his mother argued. Although defending Ms. Shumer, Mr. Allred became so angry that he threw food and furniture and broke holes in doors of the Allred residence. As a result, Mr. Allred's mother told him that he and Ms. Shumer had to move out. They moved in with friends and later rented an apartment. Mr. Allred instructed Ms. Shumer not to contact her parents or to tell them the address or telephone number of the apartment. Mr. Allred was trying to be controlling of Ms. Shumer showing jealousy of her parents. Ms. Shumer, however, was not

employed and was lonely, so she called her mother with whom she visited during the day while Mr. Allred was at work. Ms. Shumer's mother also came to the apartment and found that the young couple needed furniture. As a result, she purchased some furniture for them at a garage sale.

8. On September 18, 1993, Ms. Shumer's parents attempted to deliver the furniture to the apartment. Ms. Shumer's mother came to the door and was met by Mr. Allred, who was unaware of Ms. Shumer's contact with her parents. He was angry and told Ms. Shumer's mother he did not like her or her husband. He went into the back of the apartment to confront Ms. Shumer, appeared to growl with anger and indicated that he wanted to hurt Ms. Shumer. Ms. Shumer became frightened and concerned for her physical well being so she decided she wanted to leave. Ms. Shumer's parents said she had to tell Mr. Allred of her decision, or he would think they were influencing her. When Ms. Shumer told Mr. Allred, he became so angry that he started yelling profanities and hit the Shumer vehicle so hard that it left a dent in the hood. (Petitioners' Ex. 5.) Part of the young couple's disagreements related to his refusal to attend premarital counseling or fulfill his promise to attend church with Ms. Shumer. When he realized that Ms. Shumer was serious about leaving him, Mr. Allred promised to go to counseling and to church. His failure to fulfill his prior promises convinced Ms. Shumer that Mr. Allred was only seeking to reestablish their relationship and that he would not keep these promises.

9. The next day, on September 19, 1993, Mr. Allred came to see Ms. Shumer. The conversation focused upon Mr. Allred's efforts to convince Ms. Shumer to resume their relationship. When Ms. Shumer and her father raised the issue of the baby, Mr. Allred promised, "he would be responsible," but did not clarify when he meant by this statement. He made no offer of any money, housing, or maternity clothes, nor did he explain how he would handle the medical bills associated with prenatal care or delivery.

10. Ms. Shumer believed that Mr. Allred was only interested in his relationship with her and in the renewal of sexual relations, although she had become disinterested due to the effects of her pregnancy. Ms. Shumer believed that the natural father would not do anything regarding the pregnancy. This impression was confirmed by repeated telephone calls to Ms. Shumer or her house in which Mr. Allred only talked about the couple's relationship, not the pregnancy. This impression continued when, sometime after October 7, 1993, the Allreds forwarded to Ms. Shumer an unpaid medical bill from Mrs. Allred's doctor. (Petitioners' Ex. 1). Ms. Shumer's mother paid the medical bill.

11. Mr. Allred stopped trying to call Ms. Shumer in November of 1993. This occurred even though he knew Ms. Shumer's relationship with her parents had been problematic and she had been asked to move from their home on more than one occasion. If he had continued in his efforts to telephone her, Mr. Allred would have discovered that Ms. Shumer had moved out of her parents' house shortly after Thanksgiving of 1993, and moved in with her friend, Heather King, and Heather's mother.

12. Sometime before Christmas, Mr. Allred saw Ms. Shumer and Heather King at a shopping mall. He shouted at the women and chased them, cornering them inside a store. The women were extremely frightened, which led Heather King to state that Ms. Shumer had suffered a miscarriage. The evidence is conflicting as to whether Ms. Shumer orally, or in any other manner, confirmed this statement even though it was not true. The evidence is also conflicting as to whether Mr. Allred then pursued the women again before they left the shopping mall.

13. The foregoing conflict of evidence is not material because by early January 1994, Mr. Allred had received a letter from the Homes of St. Mark, a Texas adoption agency, confirming that Ms. Shumer was pregnant and that she had identified him as the father of the child. (Respondent's Ex. A.). Mr. Allred called the agency

expressing his opposition to a possible adoption of the child. He approved a letter to be sent by his father's attorney to the agency to oppose the adoption and to express his intention to "keep the child and raise the child himself." (Respondent's Ex. B-1.). Although requested, no evidence was produced which confirmed that the letter or acknowledgement of paternity were received by the agency. This is reinforced by the appearance that the acknowledgement of paternity is an original signed document. The agency did inform Ms. Shumer of Mr. Allred's telephone call. Mr. Allred did not offer, either in the telephone call or the letter, any form of support for Ms. Shumer. Mr. Allred made no effort through the Homes of St. Mark, Ms. Shumer's parents, Ms. Shumer's sister, Abigail, in whom Mr. Allred had previously confided, or Ms. Shumer's friends who were known to Mr. Allred, to locate her or offer to or provide her any form of support. If he had done so in January of 1994, Mr. Allred would have discovered that Ms. Shumer was living with a new boyfriend, Adam Thal.

14. Mr. Allred's attorney noted on the copy of the letter returned to Mr. Allred's father that the letter "should take care of the situation until the baby is born." The father admitted he could have calculated the due date as being in late April, 1994, and that he was told the due date when Mr. Shumer went to the Allred's doctor; he merely had forgotten the date at the time of trial. It is apparent from the attorney's note and from logic that it was important for Mr. Allred to try to locate Ms. Shumer before late April so he could "deal with the child" during the critical period just prior to and immediately after the delivery.

15. Mr. Allred was told in April by a relative of Ms. Shumer, that she was in Kansas. Despite having information in April that Ms. Shumer was in Kansas, he made no further effort to contact her, directly or indirectly, from January through the end of April, 1994. He, therefore, neither provided nor offered any form of support to Ms. Shumer during the six-month period prior to the child's delivery on

April 26, 1994, the original due date. He made no such effort even though in early March 1994, he was inferentially told Ms. Shumer was no longer living with her parents when mail was forwarded to Ms. Shumer at her parents' address was returned marked, "Moved, Not Here."

16. In early 1994, Ms. Shumer met with an adoption agency in Ohio. Ms. Shumer selected adoptive parents from several possible families. Since the adoptive parents lived in Kansas and Ms. Shumer needed living expenses during the remainder of her pregnancy, she and her boyfriend moved to Wichita in late January or early February, 1994. The adoptive couple were working with Adoption Centre, Inc. of Kansas ("Adoption Centre") which then coordinated the living expenses and made the arrangements for Ms. Shumer to have telephone service. By March 5, 1994, a telephone was installed and Ms. Shumer and her boyfriend were listed in the Wichita telephone directory.

17. Mr. Allred or his father later found a company, called Find People Fast, which helps locate people. From the Stipulation of the parties, Find People fast could have located Ms. Shumer's address within two to three days following the telephone listing on March 5, 1994. The service costs only $29.00. Mr. Allred testified he did not ask the Bank representative who suggested Find People Fast about such an organization until late May or early June, 1994.

18. The child was born on April 26, 1994. Ms. Shumer signed a relinquishment of the child to the Adoption Centre on April 27, 1994. The child was physically placed with the adoptive parents on or [sic] April 29, 1994. The adoption was filed on June 8, 1994. was filed on June 8, 1994. The proceedings had a significant connection to Sedgwick County, Kansas, as the only county in which the child had lived, the mother had lived there for more than 60 days, and all the petitioners were residents of the county.

19. By June 7, 1994, Mr. Allred's father had contacted Find People Fast and the company immediately

located Ms. Shumer's address in Wichita. Even though delivery of the child was expected in late April, 1994, Mr. Allred elected not to contact Ms. Shumer in June of 1994, fearing that she would move again. There is no evidence that Mr. Allred consulted with an attorney in April, May, or June about what steps he should take to oppose an adoption, nor was there any evidence as to what he thought Ms. Shumer would do with the child while he remained uninvolved in the delivery and post delivery placement of the child.

20. From April 26, 1994, the child's due date, to July 5, 1994, Mr. Allred made no attempt to contact Ms. Shumer, her family, her sister, Abigail, Ms. Shumer's friends who were known to Mr. Allred, or Homes of St. Mark to ask whether the child had been delivered, whether he could see the child, whether he could have custody of the child or what he could do to establish or preserve his relationship to the child, which at that point was only biological.

21. On or shortly before July 5, 1994, a private investigator contacted Mr. Allred at work as a result of efforts by Adoption Centre to locate him. In the fall of 1993, he had switched apartments within the complex where he lived, and then moved to his parents' house. None of these moves were known to Ms. Shumer. Adoption Centre has a policy of contacting only the natural father involved in a potential adoption, not knowing if the father's parents know of the pregnancy, or whether he wants them to be involved in decisions about the prospective adoption. Mr. Allred then called Adoption Centre and left his employment telephone number. Mr. Allred was formally served in this proceeding on July 8, 1994.

22. The evidence suggests that absent the contact initiated by Adoption Centre, Mr. Allred would have continued to avoid any contact with Ms. Shumer, her parents, her sister, her friends or Homes of St. Marks to

determine what action Ms. Shumer took with the child when delivered on April 26, 1994.

23. Mr. Allred failed to file an objection with the court or Adoption Centre within 30 days of the placement of the child with the adoptive couple on April 29, 1994. The first formal objection was filed on July 15, 1994, more than 30 days after Mr. Allred had Ms. Shumer's address in Wichita, Kansas.

24. The natural father, after having knowledge of the pregnancy, failed, without reasonable cause, to provide support for the natural mother during the six months prior to the child's birth and until the natural mother signed the relinquishment on April 27, 1994, based upon the following facts:

(a) After September 19, 1993, Mr. Allred did not provide nor offer any form of financial, emotional, physical or communicative support to the [sic] Ms. Shumer in relation to the pregnancy.

(b) On September 19, 1993, Mr. Allred stated he would "be responsible" for the pregnancy and the baby. There is not evidence that Mr. Allred provided any financial support for Ms. Shumer in spite of the fact that, according to his testimony, he had $600 to $1000 of disposable monthly income which he could have made available for Ms. Shumer's support. Forwarding the unpaid doctor's bill in October of 1993, created the impression that Mr. Allred was not going to assume his responsibility. His move to another apartment, leaving Ms. Shumer's name on the utility bill, even though he had promised to pay for the utility bills for the apartment since Ms. Shumer was not working, indicated a further lack of responsibility for her financial needs and obligation during the pregnancy.

(c) Mr. Allred claims that Ms. Shumer's father said he did not want Mr. Allred's help with the costs of the pregnancy. Even if this statement were made, and it was disputed by Ms. Shumer, it is not reasonable cause for Mr. Allred's failure to support the mother. Mr. Allred, not

Ms. Shumer's father, was the parent of the unborn child and he, therefore, had the primary duty of support toward Ms. Shumer. See K.S.A. § 59-2136(h)(4); In re Adoption of Baby Boy N., 19 Kan. App. 2d 574, 874 P.2d 680 (1994); In re Adoption of Hart, 577 N.E.2d 77 (Ohio App. 1989). With the conflict Ms. Shumer had experienced with her parents, it was logical to expect that Ms. Shumer might have a disagreement with her parents and be forced to move out and receive no further support from her father. This risk was heightened when Mr. Allred concluded in early January from the letter from the Homes of St. Mark, and again from the returned envelope in March of 1994, that Ms. Shumer was no longer living with her parents. Without contacting Ms. Shumer or her parents, Mr. Allred had to assume Ms. Shumer was without anyone else's support. Despite this fact, he contacted no one to determine Ms. Shumer's needs or offer or provide her any support.

(d) Even with the conflict between the natural parents, the natural father did not pursue all the opportunities and options available to him to carry out his duties to the best of his abilities. He forwarded the letter from Dr. Nadaud, the Allreds' family doctor, in October of 1993, without inquiry; he left Ms. Shumer's name on the utility bills; he did not inquire of Ms. Shumer's friends where she could be located; he did not offer in the letter sent to the Homes of St. Mark any form of support for Ms. Shumer or ask that a letter be forwarded to her to seek a resolution of their differences; nor did he propose a way to discuss a possible resolution of their conflict over the placement of the child. None of this occurred, even though Mr. Allred knew in April, in accordance with his deposition testimony presented at trial, that Ms. Shumer was in Kansas and he had means at his disposal, for only $29, to find her address in Wichita in early March of 1994.

(e) The incident at the shopping mall does not provide reasonable cause for the lack of support since Mr. Allred was notified in writing in early January, 1994, that

Ms. Shumer was still pregnant and was identifying him as the child's father.

(f) Mr. Allred previously knew the child's due date, even though he could not remember it at trial, and was informed by his father through his Ohio lawyer, that steps would have to be taken when the child was born. Despite this knowledge, he took no steps to provide or offer support to Ms. Shumer to convince her not to place or prevent her from placing the child for adoption.

(g) The items suggested as support for the natural mother were either not support for the mother, or were so incidental or insignificant that they were disregarded by the Court. Mr. Allred provided no proof that he reimbursed his parents for the medical bills they paid for Ms. Shumer's benefit. In addition, only one bill for $25 clearly related to the pregnancy and it was paid by Mr. [sic] Shumer's parents on August 30, 1993. Only one other bill might relate to the pregnancy. It was for $25.61 and was paid by Mr. [sic] Shumer's parents on July 7, 1993. Given the date of delivery, the court takes judicial notice of nine months of pregnancy which would place the date of the last menstrual cycle and conception on or after July 19, 1993, thereby excluding this second bill from being related to the pregnancy.

25. Petitioners did not sustain their burden of proof that Mr. Allred abandoned Ms. Shumer after having knowledge of the pregnancy.

26. Petitioners did not sustain their burden of proof that Mr. Allred willfully abandoned, failed to support or communicate with the minor. The Court believes the relevant period is only from the date of delivery to the date of placement which is only from April 26 to April 29, 1994. Although the facts in this case establish Mr. Allred was on constructive knowledge of eventual delivery date, the court does not believe constructive knowledge is sufficient to result in a finding of failing to support or communicate with the minor under the facts of this case.

27. The natural father is unfit as a parent. He failed to make financial arrangements to pay for the costs of the unborn child, failed to fulfill his promise to "be responsible" for the pregnancy and child, and failed to place his personal desires to maintain an emotional relationship with Ms. Shumer above his desire to preserve his relationship with the child. Mr. Allred has an excessive temper as evidenced by putting a dent in the Shumer vehicle with his fist, knocking holes in doors at the Allred home, being asked by his mother to move out of the Allred home because of his destructive behavior, and his violation of the law by smoking marijuana, given the undisputed testimony by Ms. Shumer. Mr. Allred only denied using cocaine, not marijuana.

28. Any findings of fact deemed conclusions of law are hereby incorporated by reference into said conclusions of law.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the issues presented herein. Respondent admitted the court has jurisdiction and although the court is unsure whether Kansas is the "home state" of the child, the standards of K.S.A. § 38-1303(a)(2) are applicable in this case as the child has only lived in Sedgwick County, the mother moved here, and the natural father filed a paternity action here. Further, both the prospective adoptive couple and Adoption Centre have standing to petition the Court for an order severing the parental rights of the natural father since both the prospective adoptive parents and the agency are residents of Sedgwick County, Kansas, K.S.A. § 59-2136(e).

2. The Court determines that the law of Kansas is controlling on the standards for terminating the parental rights of Vance Allred to Baby Boy Shumer. The Uniform Child Custody Jurisdiction Act does not by itself resolve the choice of law issue. Neither party cited a case that

establishes that the law of the state of conception applies. After examining the Restatement of Conflicts of Law, § 6, the Court concludes that the factors point to the application of law of the state exercising jurisdiction over the adoption. Under the rationale of In re Adoption of Gates, 6 Kan. App. 2d 945, 636 P.2d 818 (1981), and In re Adoption of Trent, 229 Kan. 224, 627 P.2d 433 (1981), when a court has jurisdiction over an adoption matter, the court applies the adoption laws of its state to determine the parental rights of the parties.

3. Given these conclusions, the Court does no reach the issue of the result under Ohio law.

4. Venue is properly laid in this Court.

5. A natural father's paternal rights may be severed by an order of the Court upon a showing by clear and convincing evidence of any one or more of the circumstances enumerated under K.S.A. § 59-2136(h).

6. In making the determination of whether the natural father's rights should be terminated in the face of allegations that he has either abandoned the natural mother or failed to provided support, the Court must determine whether the natural father has pursued the opportunities and options which were available to carry out such duties to the best of his abilities. In re Adoption of F.A.R., 242 Kan. 231, 747 P.2d 145 (1987). All the surrounding circumstances must be considered. In re Adoption of Baby boy S., 16 Kan. App. 2d 311, 822 P.2d 76 (1991).

7. When addressing K.S.A. § 59-2136(h)(4) regarding the failure without reasonable cause to provide support for the six months prior to delivery, the Court's consideration is analogous to the process for deciding whether to terminate a parent's rights for failing or refusing to assume the duties of a parent for two consecutive years involving an older child. In re Adoption of Baby Boy S, 16 Kan. App. 2d 311, 822 P.2d 76 (1991). On the issue of abandonment (K.S.A. § 59-2136(h)(5)), a finding of total and complete abandonment is not required to terminate

parental rights. In re Adoption of McMullen, 236 Kan. 348, 691 P.2d 17 (1984).

8. Under both provisions, the Court may disregard incidental visitations, contacts, communications or contributions. In re Adoption of McMullen, 236 Kan. 348, 691 P.2d 17 (1984). The Kansas Supreme Court has defined "incidental" in this context as casual, of minor importance, insignificant or of little consequence. Such contacts may be disregarded. In re Adoption of B.C.S., 245 Kan. 182, 777 P.2d 776 (1989).

9. The natural father, after having knowledge of the pregnancy, failed without reasonable cause to provide support for the mother during the six months prior to the child's birth. The Court must examine the natural father's activities from October 26, 1993, to April 26, 1994. During this period, Mr. Allred did not provide financial support of any kind to the mother. Although Mr. Shumer indicated that he would be responsible for the pregnancy and the child, he did not offer or provide money, housing, maternity clothes or coverage for medical expenses related to the pregnancy or delivery of the child. Additionally, Mr. Allred evidenced his intent not to provide support for the natural mother when he allowed a bill for her medical care, provided by Mrs. Allred's physician, to be forwarded to the Shumers for payment. As indicated above, the natural father also did not provide any form of emotional, communicative or physical support.

10. The natural father argues that he had "reasonable cause" not to support the natural mother. The Court concludes that the causes identified by the natural father are not legally nor factually sufficient to justify his lack of support during the critical six-month period. Initially, it should be noted that a natural mother is under no obligation to keep the natural father on notice of her whereabouts. The moves by Ms. Shumer after September 18, 1994, were not made with an intent to conceal her whereabouts from Mr. Allred. Further, Mr. Allred was not justified in his failure

to support based upon a belief that Ms. Shumer was living with, and receiving sufficient support from her parents. The natural father's obligation of support is imposed by statute which does not place a corresponding duty upon a natural mother's parents. In re Adoption of Baby Boy N., 19 Kan. App. 2d 574, 874 P.2d 680 (1994). Moreover, Mr. Allred did not know whether Ms. Shumer required his support, because he made no inquiry about her needs. Because he did not know if Ms. Shumer needed his support, Mr. Allred cannot claim that this was a reasonable cause of his failure. Id. Here, the natural father failed, without reasonable cause, to support the natural mother during the six-month period prior to the birth of the child since he has not preserved and pursued the maintenance of his biological link to the child. He, therefore, cannot veto the decision of the natural mother that adoption is in the child's best interests. Id.; In re Adoption of Baby L., 231 Kan. 199, 643 P.2d 168 (1982). It is not the biological tie that is important, rather the courts must look to the actual familial ties created and maintained between the father and the child. This link is present only with the mother prior to delivery. Stanley v. Illinois, 405 U.S. 645 (1972); Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979); Lehr v. Robertson, 463 U.S. 248 (1983). Finally, the father provided no proof of repaying his parents for their support of Ms. Shumer. See In re Adoption of Baby Boy W., No. 69,765, Kan. May 13, 1994 (approved for publication on September 9, 1994). In addition, the bills predate October 26, 1993, and are so small as to be inconsequential and, therefore, are disregarded by the Court.

11. The natural father is unfit as a parent. He did not make financial arrangements to undertake care of his child when it was born. Additionally, his violent temper which he demonstrated by making holes in doors in his parents' home and putting a dent in the Shumer's vehicle, as well as his use of marijuana in violation of the law, leads the court to the conclusion that Mr. Allred is unfit as a parent.

12. Based on the foregoing, the Court has determined that the natural father did not pursue the opportunities and options which were available to him to carry out his duties as natural father to the best of his ability. In re Adoption of F.A.R., 242 Kan. 231, 747 P.2d 145 (1987). The Court is not satisfied that the father made significant efforts to support the natural mother. The justifications which the natural father relied upon for such failure do not provide reasonable cause, relieving the father of his duty to provide support.

13. Petitioners have sustained their burden of proof on the issues of (a) the father after having knowledge of the pregnancy failed without reasonable cause to provide support for the mother during the six months prior to the child's birth; K.S.A. § 59-2136(h) and (b) K.S.A. § 59-2136(h)(2), the father is unfit. (b) Petitioners did not sustain their burden on the issue of abandonment or failure to make reasonable efforts to support or communicate with the child after having knowledge of the child's birth. The Court does not reach the issues under Ohio law.

14. The Court finds that the parental rights of Vance Allred to Baby Boy Shumer should be terminated in accordance with K.S.A. 59-2136(e) and (h)(2) and (4), and that the adoption of Baby Boy Shumer may be finalized without the consent of or notice of hearing given to Vance Allred.

15. Any of the foregoing Conclusions of Law deemed Findings of Fact are hereby incorporated into the Findings of Fact.

IT IS THEREFORE ORDERED that the foregoing findings of fact and conclusions of law be and are hereby adopted by the Court.

IT IS FURTHER ORDERED that petitioner's petition be and is hereby granted.

IT IS FURTHER ORDERED that the parental rights of Vance Allred in Baby Boy Shumer be and are hereby terminated in accordance with K.S.A. § 59-2136(4) and (5)

and the adoption of said child may be finalized without the consent of or notice of hearing being given to Vance Allred.

IT IS SO ORDERED.

/s/ Hal Malone
The Honorable Hal Malone
District Court Judge

APPROVED:

MARTIN, PRINGLE, OLIVER,
WALLACE & SWARTZ, L.L.P.

By: /s/ Ellen Tracy for
Martin W. Bauer, #08629
Attorney for Petitioners

BRUCE & DAVIS

By: /s/ Rick Davis
Rick Davis, #10254
Attorney for Respondent

No. 73,805

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE ADOPTION OF BABY BOY S.

SYLLABUS BY THE COURT

1.

When considering a conflict of law question, for a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.

2.

Kansas has an interest in ensuring that children born and residing in this state are adequately provided for by responsible adults. When parents relinquish or otherwise ignore their parental obligations to a child living in Kansas, this state has a compelling interest in ensuring the child's well-being and, when appropriate, to ensure the child is adopted by a responsible and caring family.

3.

When considering fairness in the context of a conflict of law issue, an important element is the expectation of the parties. A state may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.

4.

It is no unreasonable for parties to expect that the standards for parental obligations would be determined by the laws of the state where the child resides.

5.

In our current mobile society, the place of conception of a child carries little weight in determining the applicable state law governing standards for parental obligations. However, requiring an unwed father to make substantial efforts to remain in contact with an unwed mother and participate in the pregnancy and birth of the child, wherever it occurs, is not an unreasonable expectation.

Appeal from Sedgwick District Court; HAL MALONE, judge. Opinion filed March 8, 1996. Affirmed.

F. C. "Rick" Davis, II and *Kenneth H. Jack*, of Bruce & Davis, L.C., of Wichita, for appellant natural father.

Martin W. Bauer and *Ellen Tracy*, of Martin, Pringle, Oliver, Wallace & Swartz, L.L.P., of Wichita, for appellees A.L.L. and D.M.L., and Adoption Centre of Kansas, Inc.

Before RULON, P.J., ROYSE, J., and STEPHEN D. HILL, District Judge, assigned.

RULON, J.: V.A., the natural father of Baby Boy S., appeals from the district court's order terminating his parental rights and approving the adoption of Baby Boy S.

Essentially, we must decide if:

- Kansas adoption statutes as applied to the natural father violate the Due Process Clause of the United States Constitution,

- substantial competent evidence supports the district court's finding that the natural father lacked reasonable justification for his failure to support the natural mother during 6 months immediately preceding the birth of Baby Boy S., and

- substantial competent evidence supports the district court's finding that the natural father was an unfit parent.

We affirm.

FACTS

Baby Boy S. was born on April 26, 1994, in Wichita, Kansas, and his natural mother, R.S., relinquished the newborn infant to the Adoption Centre, Inc., of Kansas, a licensed adoption agency. R.S. left Wichita in May 1994 and moved to North Carolina.

Baby Boy S. was placed with adoptive parents residing in Wichita on April 29, 1994. A petition for adoption was filed June 8, 1994. Under K.S.A. 59-2133(b), notice of the adoption proceeding was served on V.A. on July 7, 1994. V.A. timely filed objections to the adoption and requested custody of the infant. V.A. at all times was a resident of Ohio.

Later, a petition to terminate V.A.'s parental rights was filed. Ultimately, the district court ordered V.A.'s parental rights terminated under K.S.A. 59-2136(h)(2) and (h)(4).

The findings of the district court can be summarized as follows:

R.S. left her parents' home in Whitehouse, Ohio, in May 1993 when she completed high school. She immediately moved in with V.A. and his parents in Toledo, Ohio. The relationship between R.S. and V.A. was tumultuous from the start due to V.A.'s dislike of R.S.'s parents. R.S. left V.A. following a dispute about her parents.

By early July 1993, R.S. was again living with V.A. and his parents. In early August 1993, a home pregnancy test indicated R.S. was pregnant. V.A.'s parents took R.S. to their doctor, who confirmed the pregnancy and estimated the baby's due date as April 26, 1994. R.S. had three or four doctor visits with V.A.'s family physician. V.A.'s family took her to get a medical card through a state program. Unquestionably, V.A. knew that the baby was due at the end of April 1994.

While living with V.A.'s family, R.S. and V.A. did not pay any living expenses. In late August 1993, V.A. had a fight with his family about R.S. V.A. was so angry that he threw food and furniture and broke holes in the doors at his parents' residence. R.S. and V.A. were then told to move out.

After leaving V.A.'s parents' home in September 1993, R.S. and V.A. lived with several friends but eventually lived in their own apartment. R.S. signed the lease and arranged for the utilities, believing that V.A., who was working, would pay for them. After a fight with V.A., R.S. left on September 18, 1993, and returned to her parents' home.

Eventually, V.A. asked R.S. to resume their relationship. While he promised to be responsible for the baby, there was no offer of money, housing, or maternity clothes, nor did he offer to handle the medical bills associated with prenatal care or delivery. According to R.S., V.A. was only concerned with renewing their relationship and did not inquire about the pregnancy.

About Thanksgiving 1993, R.S. moved out of her parents' house, moved in with a girlfriend, and began considering putting the baby up for adoption. She contacted a lawyer in Toledo who gave her a booklet of couples looking for babies. R.S. chose a couple who happened to live in Wichita, Kansas. She denied knowledge of any difference in the laws of Kansas or Ohio and testified that her lawyer did not suggest a Kansas couple. V.A. knew R.S. had left her parents' home.

Around Christmas 1993, R.S. and V.A. met accidentally at a local shopping mall. He shouted at R.S. and chased her and one of her girlfriends into a store. She and her girlfriend were frightened. The girlfriend told V.A. that R.S. had lost the baby because of a miscarriage. Whether R.S. confirmed the miscarriage to V.A. was disputed. Although he was uncertain if R.S. was still

pregnant, V.A. made no effort to follow up to determine the status of the pregnancy.

Eventually, in December 1993, R.S. began living with a new boyfriend, A.T., in his parents' house in Ohio.

In early January 1994, V.A. received correspondence from a Texas adoption agency, indicating that R.S. desired to put her unborn child up for adoption. He called the agency to express his opposition to the adoption. Later, he approved a letter drafted by his father's attorney opposing the adoption, expressing his intention to keep the child and conveying a written acknowledgement of paternity. V.A.'s copy of the letter included a hand-written note from the lawyer to V.A.'s father stating that the response "should take care of the situation until the baby is born." V.A. had no direct contact with the lawyer.

V.A. did not tell the Texas agency he would support the mother during her pregnancy. He did not ask for R.S.'s address, nor did he ask the agency to convey any message offering support. He did not contact R.S.'s family or any of her known friends to offer financial support or to express his opposition to the adoption.

A.T. and R.S. moved to Wichita in February 1994. The Adoption Centre helped them find an apartment and paid their bills. R.S. obtained a listed phone number under her name.

After receiving the Texas adoption agency letter, V.A. also contacted a cousin of R.S. In April 1994, R.S.'s

cousin told V.A.that R.S. was somewhere in Kansas. Between the end of April 1994 (the due date) and June 7, 1994, V.A. did not contact the Texas adoption agency, R.S.'s family, or her friends to determine if the baby had been born.

In June, 1994, V.A.'s father learned of an agency called Find People Fast and requested that they locate R.S. Eventually, V.A. learned of R.S.'s location in Wichita. He did not attempt to contact her even though he knew the baby probably had been born in late April. He did not contact an attorney to discuss custody, visitation, or what he needed to do to establish or preserve his relationship with the child.

V.A. first received confirmation of the baby's birth on July 5, 1994, when a private investigator hired by the Adoption Centre contacted him. He was served with notice of the adoption proceeding on July 8, 1994. Prior to that time, he had no knowledge that anyone other than R.S. had custody of the baby.

Based upon the above findings, the district court concluded that V.A. failed to provide support for R.S. during the 6 months prior to the child's birth and did not have reasonable cause for not providing support. The district court relied upon V.A.'s failure to offer any form of financial support to the mother after she moved out of their apartment on September 18, 1993; that V.A. had disposable income which was available to provide support; and that V.A. and/or his parents forwarded unpaid doctor bills and utility bills to R.S.'s parents for payment. The court concluded that V.A. did not pursue all the opportunities and options available to him to carry out his duties.

The district court, in an alternative finding, terminated V.A.'s parental rights on the ground that he was an unfit parent. The court relied upon his failure to make financial arrangements to pay for prenatal care or delivery of the baby. The court found that V.A. was consumed with his personal desire to maintain a relationship with R.S. rather than caring about the unborn child. The court further found that V.A. had a violent temper, evidenced by his damage to property during his fits of anger, to the extent that he was asked to move out of his parents' home. The court further found that V.A. had violated the law by smoking marijuana.

DUE PROCESS

We must decide if the provisions of K.S.A. 59-2136(h) can be applied here to terminate the father's parental rights to Baby Boy S.

K.S.A. 59-2136(h) provides:

> "[T]he court may order that parental rights be terminated, upon a finding by clear and convincing evidence, of *any* of the following: . . . .
>
> (4) the father, after having knowledge of the pregnancy, failed without reasonable cause to provide support for the mother during the six months prior to the child's birth;
>
> (5) the father abandoned the mother after having knowledge of the pregnancy." (Emphasis Added)

V.A. argued that due process requires that he be put on fair notice of the actions or inactions that could result in

the termination of his parental rights. Because he was not a Kansas resident and could not anticipate the mother moving to Kansas, V.A. argues that application of Kansas law violated his constitutional right to due process. He argues that application of Kansas law impermissibly allows unwed mothers to "forum shop" for jurisdictions with stricter statutes to prevent unwed fathers from opposing an adoption. He claims he was entitled to fair warning of the required or proscribed actions which might have resulted in the loss of his parental rights.

V.A. cites to various cases where statutes providing for termination of parental rights were held unconstitutionally vague and insufficient to warn parents of conduct which could result in termination of their parental rights. However, he does not argue that K.S.A. 59-2136 is unconstitutionally vague. Instead, he argues that he had no way of knowing that K.S.A. 59-2136 would apply and, consequently, he did not know that his failure to support the mother could result in the termination of his parental rights.

V.A.'s claims essentially raise conflict of law questions, and such issues can implicate due process standards in some circumstances. The United States Supreme Court has long recognized that a certain set of facts giving rise to a cause of action might justify the application of the law of more than one state. See *Watson v. Employers Liability Corp.*, 348 U.S. 66, 72-73, 99 L.Ed. 74, 75 S.Ct. 166 (1954). In analyzing the due process principles in conflicts cases, the Supreme Court has said:

> "In deciding constitutional choice-of-law questions, whether under the Due Process Clause or

> the Full Faith and Credit Clause, this Court has traditionally examined the contacts of the State, whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation. [Citation omitted.] In order to ensure that the choice of law is neither arbitrary nor fundamentally unfair [citation omitted], the Court has invalidated the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308, 66 L.Ed. 2d 521, 101 S.Ct. 633 (1981).

The *Hague* Court further noted that when considering conflict of law questions "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." 449 U.S. at 312-13.

V.A. does not challenge the Kansas court's jurisdiction over the adoption proceeding. R.S. had openly been a Kansas resident for at least 60 days prior to the birth of Baby Boy S. The child was born in Kansas and was relinquished to a Kansas adoption agency. The child has resided in Kansas with a Kansas adoptive family throughout the proceeding. Kansas has an interest in ensuring that children born and residing in this state are adequately provided for by responsible adults. When parents relinquish or otherwise ignore their parental obligations to a child living in Kansas, this state has a compelling interest in

ensuring the child's well-being and, when appropriate, to ensure the children are adopted by responsible and caring families. Consequently, under the facts of this case, we conclude Kansas has significant contacts creating state interests in applying its laws.

When considering fairness in the context of a conflicts issue, an important element is the expectation of the parties. A state "'may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.'" *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822, 86 L.Ed. 2d 628, 105 S.Ct. 2965 (1985) (quoting *Home Ins. Co. v. Dick*, 281 U.S. 397, 410, 74 L.Ed. 926, 50 S.Ct. 338 [1930]). In *Shutts*, the Court invalidated the Kansas Supreme Court's decision to apply Kansas law to all gas leases involved in a class action, even though a vast majority of the leases and property owners had no connection with Kansas.

Applying Kansas law to the facts in this case does not unconstitutionally impair the reasonable expectation of the parties. It is not unreasonable for parties to expect that the standards for parental obligations would be determined by the laws of the state where the child resides. This is consistent with Restatement (Second) of Conflict of Law § 289 (1969), which provides that local law should control in cases of adoption.

Under these facts, it might also be constitutionally permissible to apply Ohio law. However, we believe Ohio's state interests are more tenuous than those of Kansas. R.S. left Ohio prior to the birth of the child and has not returned since. The child was born in Kansas. In our current mobile

society, the place of conception of a child carries little weight. However, requiring an unwed father to make substantial efforts to remain in contact with an unwed mother and participate in the pregnancy and birth of the child, wherever it occurs, is not an unreasonable expectation.

Although V.A. likens R.S.'s travels to a helium balloon, he was aware that she was no longer living at her parents' home and knew almost 4 months before the baby's birth that she was considering an out-of-state adoption. However, he made no serious efforts to locate here whereabouts. The district court specifically found that R.S. did not move to conceal herself. Likewise, she testified that she did not choose to put her baby up for adoption through a Kansas agency in order to impose stricter parental obligations on the father.

V.A. relies heavily on the "fundamental" nature of his parental rights to emphasize that the law of his residence should control in this case. However, his actions (and inactions) minimized his liberty interest in initiating a parental relationship with Baby Boy S. This court explored the nature of an unwed father's interest in the parent-child relationship in *In re Baby Boy N.*, 19 Kan. App. 2d 574, 874 P.2d 680, *cert. denied* ___ U.S. ___, 130 L.Ed.2d 496 (1994). In *Baby Boy N.*, this court upheld the constitutionality of K.S.A. 59-2136(h)(4), (5). In that case, an unwed father challenged the statute, arguing that his parental rights could not be terminated absent a specific finding that he was an unfit parent. 19 Kan. App. 2d at 579. This court, in studying United States Supreme Court precedent, noted:

"There is every reason for protecting the rights of a father to children, illegitimate or not, whom he has reared, loved, and supported. This is the true parental right which we protect, and it involves not only the individual rights of the father but the broader concept of family, which is also entitled to protection. By the same token, where the father's 'right' is purely biological and there has been no family formed, no bonding, no support, and no love, that right seems to be obviously less deserving of support. Those instances specified under K.S.A. 38-113a and K.S.A. 1993 Supp. 59-2136(h)(1)-(7) in which consent may be declared unnecessary are examples of situations in which the right of a natural father is little more than biological." 19 Kan. App. 2d at 583-84.

The above reasoning is consistent with United States Supreme Court standards in *Lehr v. Robertson*, 463 U.S. 248, 77 L.Ed.2d 614, 103 S.Ct. 2985 (1983). In *Lehr*, the Court held:

"When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child.' [citation omitted] his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he 'act[s] as a father toward his children.' [Citation omitted.] But the mere existence of a biological link does not merit equivalent constitutional protection." 463 U.S. at 261.

Various state courts have addressed whether the application of forum law violated the due process rights of an unwed out-of-state father. All of these cases rely on the United States Supreme Court cases of *Lehr* and *Caban v. Mohammed*, 441 U.S. 380, 60 L.Ed.2d 297, 99 S.Ct. 1760 (1979), in examining the statutes and facts in each case.

The Indiana Court of Appeals' decision in *B.G. v. H.S.*, 509 N.E.2d 214 (Ind. App. 1987), is not unlike the facts before this court. In *B.G.*, an unwed father challenged the adoption of his child in Indiana. The child's father and mother had lived together in Florida, where the baby was conceived. The father learned of the pregnancy 6 months before the baby's birth and before the mother returned to her family in Indiana. Several months before the baby's birth, the father sent a certified letter to the mother's parents acknowledging paternity, offering support, and stating his intent to refuse to consent to an adoption. The baby was born, and the mother signed a consent for adoption shortly thereafter. The father challenged the adoption, arguing that the Indiana statute requiring an expectant father to file a notice of paternity was unconstitutional.

The Indiana Court of Appeals reviewed the extent of the father's due process rights, noting that the Court in *Lehr* distinguished between a developed parent/child relationship and a mere biological link. 509 N.E.2d at 215. The court noted that Indiana law permitted an expectant father to file a paternity action prior to the birth of the child, holding that it was "not reasonable to require, that in order to protect this opportunity [to establish a parent/child relationship], an unwed father be required to take a step toward establishing such a relationship and toward accepting such responsibilities." 509 N.E.2d at 216. The court concluded that the father's untimely paternity action should be dismissed. 509 N.E.2d at 217.

Similarly, in *Mullis v. Kinder*, 568 N.E.2d 1087 (Ind. App. 1991), the court upheld the constitutionality of the Indiana law applied in an adoption proceeding. The adult

father was a Florida resident. The infant was conceived in Florida, and, thereafter, the 15-year-old mother returned to Indiana. The mother placed the baby up for adoption. The natural father objected to the adoption approximately 5 weeks after the petition for adoption was filed. The trial court held that the father's consent was not necessary based upon an Indiana statute which provided that a natural father's consent was not necessary when the pregnancy was the result of "child molestation." The father appealed, challenging the constitutionality of the application of the statute because he did not have notice of the "'potential future implication' of the [Indiana] act" and relying on the principle of being entitled to notice of wrongful conduct. 58 N.E.2d at 1090. The Indiana Court of Appeals rejected the father's arguments by ruling that ignorance of Indiana law was "no excuse." 568 N.E.2d at 1090.

Finally, V.A.'s reliance on Ohio law defining the obligations of unwed fathers provides little support for his arguments. As noted below, Ohio law provides that in certain circumstances, failure to financially support an unwed mother during her pregnancy may make the unwed father's consent unnecessary in an Ohio adoption. See *In re Adoption of Klonowski*, 87 Ohio App. 3d 352, 354-56, 622 N.E.2d 376 (1993); *In re Adoption of Hart*, 62 Ohio App. 3d 544, 552, 577 N.E.2d 77 (1989).

For the above reasons we conclude that the application of Kansas law in this case did not deprive V.A. of an substantive or procedural due process rights.

REASONABLE JUSTIFICATION

V.A. does not challenge the sufficiency of the evidence supporting the district court's factual findings that he did not support the mother during the 6 months before the birth of Baby Boy S. Instead, he argues that the facts found by the court fail, as a matter of law, to establish that the failure to support the mother was without "reasonable cause."

Our standard of review in a case where the district court has made findings of fact and conclusions of law has been defined as follows:

> "When findings of fact are attacked for insufficiency of evidence or as being contrary to the evidence, the duty of the appellate court extends only to a search of the record to determine whether substantial competent evidence exists to support the findings. An appellate court will not weigh the evidence or pass upon the credibility of the witnesses. Under these circumstances, the reviewing court must review the evidence in the light most favorable to the party prevailing below.'" *In re Baby Boy N.*, 19 Kan. App. 2d at 586 (quoting *In re Adoption of F.A.R.*, 242 Kan. 231, Syl. ¶ 2, 747 P.2d 145 [1987]).

V.A. argues, however, that since he has not challenged the district court's factual findings, this court can review de novo the district court's conclusion that he lacked reasonable cause for failing to support the mother. A similar argument was rejected by our Supreme Court in *In re*

Adoption of Baby Boy B., 254 Kan. 454, 866 P.2d 1029 (1994). Because the testimony was conflicting in this case, de novo review is not appropriate. See 254 Kan. at 458-60. The fact that the father does not specifically challenge the district court's findings does not change the standard of review.

Determining whether the father has failed without reasonable cause to provide support for the mother during the 6 months prior to the child's birth as required by K.S.A. 59-2136(h)(4) is "'analogous to cases where the trial court must determine if a parent has failed or refused to assume the duties of a parent for two consecutive years prior to an adoption pursuant to K.S.A. 1990 Supp. 59-2136(h)(7).'" *In re Baby Boy N.*, 19 Kan. App. 2d at 587 (quoting *In re Adoption of Baby Boy S.*, 16 Kan. App. 2d 311, 313, 822 P.2d 76 [1991]). In making this decision, all relevant surrounding circumstances must be considered and may include the father's conduct more than 6 months before the birth of the baby. 19 Kan. App. 2d at 587. "[W]here a trial court finds that a father's reasonable efforts to provide for his child's welfare failed because of interference by the mother, adoption agency, or adoptive parents, the statute should not operate to terminate his parental rights." 19 Kan. App. 2d at 585.

As in the case of *In re Baby Boy N.*, there is no dispute here that the father provided no support, financial or otherwise, to the mother in the 6 months before she gave birth. V.A. argues that he had reasonable cause for failing to support the mother during the last 6 months of her pregnancy. V.A. argues that he was represented by counsel during the 6-month period and relied upon his attorney's

representations that he need take no action. He states that the legal advice he received was correct in the two jurisdictions in question -- Texas and Ohio.

A putative father's reliance on legal advice was rejected as "reasonable cause" in a case substantially similar to the facts here. In *In re Baby Boy N.*, 19 Kan. App. 2d 574, the putative father challenged the district court's finding that his parental rights should be terminated for failing to support the child's mother during the last 6 months of her pregnancy. 19 Kan. App. 2d at 575-76. The father argued that he consulted with an attorney as to what legal steps could be taken to prevent the adoption and was told there was nothing he could do until the child was born. This court upheld the trial court's finding that "the mere fact that [the father] could do nothing to prevent the adoption of the child prior to its birth did not constitute a reasonable excuse for his failure to provide support." 19 Kan. App. 2d at 588.

The district court in this case found that the only evidence of V.A.'s reliance on any legal advice was that he approved a letter sent to the Texas adoption agency to oppose the adoption. The court found that, at best, the attorney's message to V.A.'s father was that the letter to the agency "should take care of the situation until the baby is born." Notwithstanding the indication that action needed to be taken once the baby was born, the court found that V.A. did little after the baby's anticipated due date to locate the child, assert parental rights, or assume parental responsibilities. There is no evidence that V.A. had any *direct* contact with his attorney, even after the baby's birth, until he was served with the petition for adoption. Moreover, there is no evidence that he had an ongoing

attorney/client relationship during this period. Consequently, there is substantial evidence to support the district court's decision that his purported reliance on the note from his father's lawyer was not "reasonable cause" for his failure to support the mother during her pregnancy.

A review of Ohio law also undermines V.A.'s claim that his failure to support the mother was justified. Here, V.A. repeatedly asserts that failure to support a pregnant mother is not grounds for termination of parental rights under Ohio law. This is simply not the case. Ohio law provides that a putative father's consent is required before adoption if the father files an objection within 30 days of the filing of the petition or placement for adoption. Ohio Rev. Code Ann. § 3107.06(F)(4) (Anderson 1989). The adoption statutes further state, however, that consent of an unwed father is not necessary if he files an untimely objection with the court and, after notice and hearing, the court finds the putative father willfully failed to care for and support the child *or* abandoned the mother during her pregnancy. Ohio Rev. Code Ann. § 3107.07(B) (Anderson 1989).

V.A. argues that he did not abandon R.S., but that she left him. However, Ohio courts do not interpret Ohio Rev. Code Ann. § 3107.07(B) that narrowly. The scope of § 3107.07(B) was addressed by the Ohio Court of Appeals in *In re Adoption of Hart*, 62 Ohio App. 3d 544. In *Hart*, the court noted that the mother spent the last 5 months of her pregnancy with her parents and was support by welfare. The father had provided no support for her during that time, other than paying for one prenatal blood test. Although the mother and child lived with the putative father and his parents for several months after the birth of the child, all

support was provided by the child's grandparents rather than the father. Under those circumstances, the appellate court upheld the finding of willful failure to support the mother during the pregnancy and the child after his birth. 62 Ohio App. at 553. Thus, "abandonment" under the Ohio statute includes failure to financially support the mother during pregnancy. See also *In re Adoption of Youngpeter*, 65 Ohio App. 3d 172, 175-76, 583 N.E.2d 360 (1989) (under Ohio law, a putative father has an obligation to support his minor child, including the payment of medical expenses attributable to the pregnancy of the mother).

Both Kansas law and Ohio law have held that substantial interference by the custodial parent preventing the other parent from supporting and interacting with the child can be grounds to preclude a finding that the child has been abandoned. See *In re Adoption of F.A.R.*, 242 Kan. at 237; *In re Adoption of Klonowski*, 87 Ohio App. 3d at 354-56; *In re Adoption of Youngpeter*, 65 Ohio App. 3d 176-78.

Here, V.A. failed to establish, however, that R.S. or her family substantially impaired any effort on his part to support R.S. during her pregnancy. Although he claimed that he offered financial support immediately after the mother left him, the district court found that no offer of support had been made. The court also determined that even if some offer was made, it was R.S.'s father, not R.S., that rejected support. In light of R.S.'s known tenuous relationship with her parents, the court's refusal to consider this one incident as "reasonable cause" is supported by substantial evidence.

Notwithstanding R.S.'s decision to leave V.A., he was not precluded from asserting his parental rights. There were several avenues he could have taken to reflect his intent to assume his parental responsibilities. Ohio law allows any man claiming paternity to bring an action to determine the existence or nonexistence of paternity. Such an action can be filed prior to the child's birth, although a contested paternity action will be stayed until the child's birth. Ohio Rev. Code Ann. § 3111.04(A), (C) (Anderson 1989). A paternity action may be brought in the county where the child, the child's mother, or the alleged father resides. Ohio Rev. Code Ann. § 3111.06(A) (Anderson 1989).

In addition, Ohio law permits a natural father to file an acknowledgement of paternity in the county where the father resides once the child is born. Ohio Rev. Code Ann. § 2105.18(A) (Anderson 1994). The filing of such an acknowledgement creates a presumption of paternity. Ohio Rev. Code Ann. § 3111.03(B) (Anderson 1989).

V.A. additionally argues that he had reasonable cause not to support the mother because (1) there was no evidence that the mother was deprived of adequate housing, clothing, food, or medical attention; (2) the mother broke her marriage engagement with him, thereby reducing his obligation to support her; and (3) the mother began cohabiting with another man. These arguments are groundless.

Neither Kansas law nor Ohio law requires an unwed father to provide support only if the mother has no other source of financial support. See, *e.g.*, *In re Adoption of Hart*, 62 Ohio App. 3d at 553-54 (support from grandparents

did not prevent finding of father's willful failure to support mother and child). V.A. had no idea whether R.S. was receiving support from any source--her parents, her new boyfriend, or any governmental agency--because he chose to remain ignorant of the mother's whereabouts and circumstances.

V.A. additionally relies on general authorities controlling a husband's liabilities for necessaries furnished to the wife and an ex-husband's obligations to pay alimony when the ex-wife cohabits with another man. These authorities have no relevance to whether his *parental* rights should be terminated. As noted above, "[t]hose instances specified under K.S.A. 38-113a and K.S.A. 1993 Supp. 59-2136(h)(1)-(7) in which consent [to adoption] may be declared unnecessary are examples of situations in which the right of a natural father is little more than biological." *In re Baby Boy N.*, 19 Kan. App. 2d at 584. In essence, the mother's merit or character is not relevant to whether an unwed father is obligated to support the mother during her pregnancy in order to protect his rights to the unborn child.

For the above reasons, we conclude the district court's finding that V.A. without reasonable cause, failed to support the mother during the 6 months prior to April 26, 1994, is supported by substantial evidence.

UNFIT PARENT

Finally, V.A. challenges the district court's finding that he was an unfit parent. He argues that this portion of the district court's order was not supported by substantial evidence.

The standard of review in a case involving the termination of parental rights is whether there is substantial competent evidence in the record to support the trial court's decision that the parent was unfit and that the parental rights should be terminated. *In re S.M.Q.*, 247 Kan. 231, 240, 796 P.2d 543 (1990). Although the State has the burden to prove "unfitness" by clear and convincing evidence before the district court, the clear and convincing standard does not affect this court's scope of review. See 247 Kan. at 240. This court cannot reweigh the evidence, substitute its evaluation of the evidence for that of the trial court, or pass upon the credibility of the witnesses. The court must review the evidence in the light most favorable to the part prevailing below. 247 Kan. at 234; *In re T.D.W.*, 18 Kan. App. 2d 286, 289-90, 850 P.2d 947 (1993).

A parent must be found "unfit" by the trial court before parental rights may be severed. K.S.A. 1994 Supp. 38-1583(a); *In re M.M.*, 19 Kan. App. 2d 600, 607, 873 P.2d 1371 (1994). "'The term "unfit" is defined to include inherent mental and emotional incapacity to perform parental obligations which can constitute such breach of parental duty as to make the parents unfit to be entrusted with custody of their child.' [Citation omitted.]" *In re N.D.G.*, 20 Kan. App. 2d 17, 21, 883 P.2d 89, *rev. denied* 256 Kan. 995 (1994); see *In re M.D.S.*, 16 Kan. App. 2d 505, 508, 825 P.2d 1155 (1992).

Briefly said, we have considered the record in light of our standard of review and firmly conclude that the district court did not err in terminating V.A.'s parental rights because he was an unfit parent.

Affirmed.

SUPREME COURT ORDER

DISTRICT CASE NO. 94A141

IN THE SUPREME COURT
OF THE STATE OF KANSAS

F.C. "RICK" DAVIS II
BRUCE & DAVIS
2121 W. MAPLE
WICHITA, KS 67213-3398

IN THE MATTER OF THE ADOPTION
OF BABY BOY S.,
A MINOR CHILD. NO.95-73805-AS

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION FOR REVIEW BY APPELLANT, VANCE ALLRED.
CONSIDERED BY THE COURT AND DENIED.
RESPONSE NOTED.

DATE: 05/03/96.

CAROL G. GREEN
CLERK